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No. 04-487

IN THE

Supreme Court of the United States

PETER S. VISNIC, MICHAEL GRYNBERG, LEROY HIBBITTS, SAJID KALEEM AND PHILIP WEISBURGH, IRA,

Petitioners,

NORTEL NETWORKS CORPORATION, JOHN ANDREW ROTH, WILLIAM F. CONNOR, CHAHRAM BOLOURI AND FRANK DUNN

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

REPLY TO BRIEF IN OPPOSITION

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I. INTRODUCTION

Unable to deny the demonstrable effect Defendants' statements had on the market price of the JDS Uniphase ("JDSU") securities purchased by Plaintiffs and, thus, Plaintiffs' ability to satisfy the Second Circuit's test for "in connection with" pronounced in *In re Ames Dept. Stores, Inc., Stock Litig.* 991 F.2d 953 (2d Cir. 1993) (in an efficient market, defendants' statements are in connection with plaintiffs' purchases if they were material to such investors), Defendants sold the lower courts a suit woven of invisible cloth.

Defendants induced the lower courts to ignore this Court's holding in *Blue Chip Stamps v. Manor Drug Store,* 421 U.S. 723 (1975), that the mere act of purchasing or selling the security at issue confers standing and, instead, to focus on what was expressly pronounced by this Court to be its *dicta* applying that holding to the facts of that case. As Plaintiffs repeatedly brought to the lower courts' attention, *Blue Chip* firmly establishes Plaintiffs' standing and no court has ever read *Blue Chip* in the manner advocated by Defendants. Defendants fictitiously responded, as they do in their Brief in Opposition ("Def. Brief"), by accusing Plaintiffs of attempting to broaden the holding of *Blue Chip*, terming the rule of law pronounced therein "universal standing" and attributing it to Plaintiffs.

When Plaintiffs urged the lower courts to apply the unambiguous text of Section 10(b), which dictates that the statute applies whenever a plaintiff purchases or sells "any security," Defendants, as they do in their Brief, accused Plaintiffs of seeking to rewrite the statute. Nothing could be further from the truth. Plaintiffs urged the courts to accept the obvious: "any" means any. At Defendants' behest, it was the Second Circuit which rewrote this statute, limiting "any" to any type of security issued by the company which issued the challenged statements. In doing so, it violated a longstanding principle of statutory construction requiring the courts to strictly apply such unambiguous congressional directives.

The denial of standing in this case cannot be squared with *Semerenko v. Cendant Corp.*, 223 F.3d 165, 176 (3d Cir. 2000) because *Semerenko* presumed the plaintiffs' standing and, instead, analyzed defendants' potential liability in the context of the "in connection with" component of Section 10(b). In their Brief, Defendants merely recite that, in *Semerenko,* there was a tender offer while here there was not. This factual distinction is without legal significance since it begs the question of whether Defendants' statements deceived Plaintiffs, or, stated differently, whether their statements artificially inflated the price of the JDSU securities Plaintiffs purchased. Furthermore, this factual distinction does not permit or justify the lower courts' refusals to heed this Court's prior pronouncements that even statements issued in the context of a speculative tender offer (or one never completed, as was true in *Semerenko)* may be material to investors in the securities of the proposed target company. *Basic, Inc., v. Levinson,* 485 U.S. 224, 236 (1988); *see also Semerenko,* 223 F.3d at 177. This is true even though the target company did not issue those statements. Moreover, this factual distinction rings pale when one considers that Defendants misrepresented the value of an undeniably material asset (65 million shares of Nortel stock supposedly worth $2.5 - $3.0 billion) which was to be, and did get, transferred to JDSU by Nortel. The consummation of this transaction renders its nexus to Plaintiffs' purchases even closer than the *Semerenko* plaintiffs were to the aborted tender offer in *Semerenko.*

Finally, now that Plaintiffs' Petition notes the harms inherent in the application of the Opinion and demonstrates that the Second Circuit's policy concerns regarding vexatious litigation have never come to fruition notwithstanding the passage of thirty of years since *Blue Chip,* Defendants accuse Plaintiffs of raising "speculative" and "hyperbolic" concerns. Effectively asking this Court to acknowledge the invisible suit woven by Defendants in the lower courts, they now urge this Court to ignore the clear import and holding of the Opinion.

II. ARGUMENT

A. The Opinion Conflicts With This Court's Prior Determinations Of Standing.

Defendant's Brief makes clear what is undeniable: prior to the Opinions issued below, *no* court, in the thirty years since *Blue Chip* was decided, has held that a plaintiff who purchases the very security at issue or in question in their claims lacks standing. While Defendants assert that "[t]his Court repudiated Plaintiffs' expansive theory of Section 10(b) standing decades ago in *Blue Chip*", Def. Brief, p.5, in actuality, *Blue Chip* expressly and repeatedly confirms Plaintiffs' standing to bring the claims presented in this case. *Blue Chip* held that, in order to have standing, a plaintiff merely need purchase or sell "a security", "securities", the "security in question", or the security "at issue". Plaintiffs' Petition for Writ of Certiorari, pp. 9-10 ("Petition"). Thus, *Blue Chip* repeatedly interpreted Section 10(b) to permit what Defendants now euphemistically dub an "aberrant theory of universal standing." Def. Brief, pp. 3, 5. Far from seeking to expand *Blue Chip's* holding, Plaintiffs seek merely to rectify the lower courts' errors in failing to apply that holding. The security at issue or in question in Plaintiffs' claims is JDSU common stock, which was purchased by Plaintiffs and all other members of the Class. The Opinion improperly shifts the focus of standing from Plaintiffs' claims to the type of defendant issuing the statements artificially inflating the securities purchased by Plaintiffs.

In applying its holding to the facts at hand, *Blue Chip* pronounced that "[t]he virtue of the *Birnbaum* rule, simply stated, *in this situation*, is that it limits the class of plaintiffs to those who have at least dealt in the securities to which the prospectus, representation, or omission relates." *Blue Chip*, 421 U.S. at 747 (emphasis added). *Blue Chip* does not in any way, shape or form suggest that its holding, that a plaintiff has standing if he/she purchases securities (rather than merely holds or refrains from purchasing or selling securities), was

modified by the application of that holding to the facts at hand. Defendants themselves acknowledge that the Supreme Court's decisions have a "much broader reach than the mere resolution of unique facts involved in that one case." Def. Brief, p. 7, ftnt. 3. Thus, contrary to Defendants' assertion that "[t]he Second Circuit's ruling is firmly grounded in bedrock principles of securities laws," Def. Brief, p.1., the Opinion is actually grounded on the Second Circuit's inaccurate finding that *Blue Chip's dicta* cited above was its holding. It bears repeating that no court has ever come to the same conclusion.

Defendants' suggestion that Plaintiffs, who purchased the very stock at issue in their claims, are nonetheless "nonpurchasers" within the purchaser-seller standing requirement first pronounced in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir. 1952), *cert. denied*, 343 U.S. 956 (1952), is utterly devoid of *any* support, at direct odds with *Blue Chip's* actual holding, and wholly unsupported by *Blue Chip's* analysis of the vagaries of proof which would present themselves if those who engage in no transactions were permitted to bring Section 10(b) claims. Plaintiffs' purchases of JDSU stock are the exact type of demonstrable proof which *Blue Chip* held eliminates such vagaries. Neither *Birnbaum* nor *Blue Chip* hold that a plaintiff's standing is determined by examining whether plaintiff purchased the securities of the company which issued the challenged statements.

In fact, the Second Circuit did *not* find that Plaintiffs lacked standing because Defendants' statements did not relate to JDSU stock. Instead, it held that Plaintiffs lacked standing because the material statements which artificially inflated the stock purchased by Plaintiffs were not issued by the company whose stock Plaintiffs purchased. App. 13a. An analysis of whether Defendants' statements "relate[d]" to JDSU or its stock would have ineluctably led to an affirmative conclusion since those statements not only had a demonstrable effect on JDSU's stock price, but also, on occasion, specifically

referenced JDSU and the Laser Business transaction.[1] In fact, the Opinion's holding accepts the materiality of Defendants' statements to the securities purchased by Plaintiffs. App. 13a.[2]

B. The Second Circuit Inappropriately Rewrote Section 10(b).

Section 10(b) unambiguously confers standing on purchasers or sellers of "any security." Contrary to Defendants' assertions, Plaintiffs' reading of this statute is anything but "creative," nor do Plaintiffs seek to rewrite this statutory directive. Instead, it was the Second Circuit that did so by limiting the scope of the statute to any type of security of the company issuing the challenged statements. Def. Brief, p. 10. As this statutory language makes clear, "any" means any.[3] A plaintiff has standing under Section 10(b) whether he purchases any type of

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[1] Of course, an examination of the nexus between the content of Defendants' statements and the security purchased by Plaintiffs is exactly what the "in connection with" analysis is about.

[2] *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 277 (1992) (O'Conner, J. concurring), cited by Defendants for the proposition that "in *Blue Chip*, . . . we confirmed the federal courts' 'longstanding acceptance' of the rule that a plaintiff must have actually purchased or sold the securities at issue in order to bring a Rule 10b-5 private damages action," clearly supports Plaintiffs' standing. In *Holmes*, the plaintiff was neither a purchaser nor a seller of securities. Thus, the Court held merely that the plaintiff, an insurer of investors' funds, was only indirectly injured by the defendants' conduct and, therefore, could not maintain a RICO claim because it could not establish the causation element of such a cause of action. *Id.* at 270. Plaintiffs' purchases of JDSU stock distinguish them from the plaintiff in *Holmes* and make them persons *directly* affected by Defendants' misrepresentations.

[3] Equally fanciful is Defendants' assertion that Plaintiffs "acknowledge that the treatise the Opinion cites directly supports the Second Circuit's construction of that language." Def. Brief, p. 10. ftnt. 6. In reality, Plaintiffs pointed out how that treatise offered no support for the Court's narrow reading of the term "any." Petition, p. 16, ftnt. 10.

security *or* any company's securities. While courts are obligated to strictly apply unambiguous statutory directives, the Second Circuit was only able to issue the Opinion by inappropriately rewriting the unambiguous text of Section 10(b).

C. The Opinion Undermines This Court's Prior Interpretations Of Section 10(b) And The Connection with Component of that Statute.

Although Plaintiffs' Petition merely recites this Court's and the Second Circuit's prior holdings on the scope of the "in connection with" component of Section 10(b), Defendants accuse Plaintiffs of offering a "grandiose," "unfounded" and "untenable" theory of "in connection with." As Plaintiffs' Petition demonstrates, the Opinion sharply conflicts with this Court's prior opinions: (a) interpreting Section 10(b) generally, finding that it is not to be interpreted technically and restrictively, but flexibly to effectuate its remedial purposes and to implement a policy of full disclosure; and (b) specifically interpreting the "in connection with" component of Section 10(b), found to be satisfied whenever defendant's conduct touches plaintiff's purchase or sale of securities. Petition, p. 17-18. Additionally, the Opinion undermines *Ames,* which holds that, in an efficient market, defendants' statements are "in connection with" plaintiffs' purchases if they are material to plaintiffs. *Ames*, 991 F.2d at 964. Even though defendants' conduct or statements may be demonstrably "in connection with" plaintiffs' purchases, as is the case here, in the Second Circuit, whole categories of plaintiffs will never be able to reach the issue, since they will be denied standing based on the defendants' status. The Opinion allows defendants to accomplish indirectly (through standing) what this Court has precluded them from doing previously (by broadly reading the "in connection with" component of Section10(b)) and thereby undermines decades of Supreme Court and appellate court precedent.

Seeking to conceal the open conflict between the Opinion and this Court's prior pronouncements on "in connection with," Defendants argue that liability under Section 10(b) only exists if Defendants' misrepresentations "relate intentionally and directly to the securities bought and sold by the Plaintiffs." Def. Brief, p. 9.[4] First, whether Defendants intentionally sought to inflate JDSU's stock by issuing their misrepresentations is irrelevant. *See, e.g., Semerenko*, 223 F.3d at 176; *Ames*, 991 F.2d at 965. As these opinions demonstrate, that Defendants' statements caused the artificial inflation in the shares purchased by Plaintiffs is sufficient to satisfy the "in connection with" requirement.

Second, the cases cited by Defendants offer no support for their position. As the *Ames* court recognized, in *Pross. v. Katz*, 784 F.2d 455 (2d Cir. 1986), the fraudulent conduct at issue occurred *after* the *transaction* and, therefore, could not be "in connection with" the plaintiffs' purchases. *Ames*, 991 F.2d at 966. ("The key to [*Pross*] is that the fraud followed the securities transaction.) Similarly, the conduct at issue in *Saxe v. E.F. Hutton & Co.*, 789 F.2d 105 (2d Cir. 1986) did not permit a finding that Section 10(b)'s "in connection with" requirement was satisfied under any test because the case involved claims that should have been brought under the Commodities Exchange Act. *Saxe*, 789 F.2d at 108-09.

Neither Defendants nor the lower courts referenced *any* case finding that material representations issued to an efficient market and inflating the securities

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[4] Defendant's effort to gain support by noting that the district court also found that Defendants' statements were not in connection with Plaintiffs' purchases is certainly curious. The lower court based its conclusion on its finding that Defendants' statements did not go to the value of the securities purchased by Plaintiffs, a test specifically rejected by this Court (even prior to the district court's opinion) in *S.E.C. v. Zandford*, 535 U.S. 813 (2002). Moreover, the district court wholly ignored an abundance of evidence confirming that, in light of the initially pending and subsequently finalized Laser Business transaction between JDSU and Nortel, Defendants' statements clearly affected the value of the JDSU stock purchased by Plaintiffs.

purchased by Plaintiffs failed to satisfy the "in connection with" requirement or that Plaintiffs lacked standing to sue because those statements were not issued by the company whose securities the plaintiffs purchased. Certainly *Gershon v. Wal-Mart Stores*, 901 F. Supp. 128 (S.D.N.Y. 1995) offers no support for either proposition. In *Gershon*, the defendants made *no statements*. *Id.* at 131. As a result, the defendants engaged in no fraudulent conduct that could satisfy the "in connection with" requirement because they had no duty to disclose that Wal-Mart had a policy of discontinuing purchases from venders found guilty of customs violations. *Id.* If anything, *Gershon* demonstrates that the courts are already more than able to determine those situations when plaintiffs overstep the legitimate boundaries of "in connection with" and that the rule of law pronounced in the Opinion, with all its potential ill effects, is unnecessary.

D. The Opinion Creates An Untenable Conflict With The Third Circuit's *Semerenko* Decision.

Defendants' position that *Semerenko* is not in conflict with the Opinion is illusory. The Third Circuit did not discuss standing because, prior to this case, no Court had ever found that a plaintiff who purchased the security at issue in his claims lacked standing. The nakedness of Defendants' assertion that *Blue Chip* provides the basis for such a conclusion is demonstrated not just by the argument that the Third Circuit, in *Semerenko*, supposedly overlooked this purportedly pivotal issue, but also by the fact that hundreds of courts over the last three decades supposedly did the same. Yet, to accept Defendants' position requires one to adopt this wholly implausible proposition.

Applying the rule of law announced in the Opinion would preclude liability under the facts present in *Semerenko* since plaintiffs, purchasers of ABI stock, would be precluded from suing Cendant, given that plaintiffs did not buy Cendant stock. While the Second Circuit attempted to backpedal from the application of its own

holding, there is no indication of why or how the Opinion leaves room for doing so. The Second Circuit's holding, that plaintiffs "do not have standing to sue under Section 10(b) and Rule 10b-5 when the company whose stock they purchased is negatively impacted by the material misstatement of another company, whose stock they did not purchase," App. 13a, leaves no room for an analysis of the nexus between Defendants' statements and Plaintiffs' purchases. Moreover, this analysis, which is supposed to occur in the context of determining whether defendants' statements were "in connection with" plaintiffs' purchases, would have confirmed Plaintiffs' standing given the direct, immediate and dramatic effect of Defendants' statements on the market price of JDSU stock.

E. The Opinion Threatens To Undermine The Integrity Of The Securities Markets.

The rule of standing set forth in the Opinion not only unjustly renders Plaintiffs collateral damage under the federal securities laws, but also bars many classes of plaintiffs who, until now, were free to present claims that various defendants' statements artificially inflated the securities they purchased. Plaintiffs' Petition provides numerous examples of the types of plaintiffs who now may be found to lack standing and the types of defendants, depending on the circumstances, which now enjoy immunity under Section 10(b). Defendants' attempt to limit the effect of the Opinion by rewriting its holding (that standing exists if the *dicta* in *Blue Chip* is satisfied) is legally untenable, at odds with the Court's actual holding, App. 13a., and ignores the fact that the Second Circuit, while holding that the district court's analysis of the issue was flawed, made no effort to determine if Defendants' statements related to JDSU stock. Had the Second Circuit undertaken this analysis, Plaintiffs' standing, even under this test, would have been clear. See Petition, pp. 2-6. In fact, Defendants never denied that their statements were material to JDSU investors and the Opinion accepts that fact. App. 13a.

The Second Circuit acknowledges that the Opinion is premised on the policy concern that permitting the Plaintiffs to proceed would open a floodgate of litigation. There is *no* proof that this is so. *See* Petition pp. 20-22. In fact, while Plaintiffs found just a handful of situations wherein some unique nexus between two companies permitted Plaintiffs to bring claims that statements by one of the companies artificially inflated the market price of the other company's securities, Defendants have now cited *one* case which is close to being on point, *Gershon*. The *Gershon* opinion, however, confirms that the courts are more than able to detect and dismiss those cases wherein plaintiffs baselessly allege that a defendant's statements were in connection with plaintiffs' purchases. As the Second Circuit's policy concern is illusory, there is no justification for denying whole categories of investors their constitutional right to enjoy the protections of the federal securities laws.

III. CONCLUSION

Consistent with this Court's prior opinions broadly interpreting Section 10(b) so as to protect the integrity of the markets and promote a philosophy of full disclosure, Plaintiffs respectfully request that this Court grant their Petition.

Respectfully submitted,

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